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No. _____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION,
Petitioner,

v.

LLOYD B. FRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35pp

QUESTION PRESENTED

Did the decision of the Court of Appeals for the Fourth Circuit in this case dismissing the case as moot - - without even addressing the exceptions to the mootness doctrine under State and Federal decisions - - violate the petitioner's right to due process of law under the Fifth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The opinion of the United States Bankruptcy Court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was October 26, 1999

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §2101(c).

IN THE SUPREME COURT OF THE

UNITED STATES

No. _____

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION,

Petitioner,

Vs.

LLOYD B. FRY,

Defendant.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION PURSUANT TO RULE 29(6)

Pursuant to Central West Virginia Development Corporation who is petitioner, makes the following disclosure:

1. Is the petitioner a publicly held corporation or other publicly held entity? (check one) ( ) Yes (X) No

2. Is the petitioner a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

(check one) ( ) Yes (X) No

3. There is no parent or publicly held company owning ten per cent (10%) or more of the petitioner's stock.

4. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation? (check one) ( ) Yes (X) No

(signature) (date)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Fifth Amendment, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public

use, without just compensation.

11 U.S.C. §363 (m) provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

Central West Virginia Development Corporation filed for Chapter 11 Bankruptcy relief and the Bankruptcy Court dismissed the bankruptcy filing under the terms of *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989), as a bad faith filing.

B. The Course of the Proceedings.

On April 12, 1996, Central West Virginia Development Corporation, Petitioner, filed for Chapter 11 Bankruptcy Relief before the United States Bankruptcy Court for the Northern District of West Virginia. On April 3, 1997, the office the United States Trustee filed its Motion to Dismiss this bankruptcy filing and requested an expedited hearing on such Motion. On

April 29, 1997, the Judge of the Bankruptcy Court, Honorable L. Edward Friend, dismissed, without prejudice,

the Petitioner's first bankruptcy filing.

On July 3, 1997, Central West Virginia Development Corporation, Petitioner, filed its second petition for Chapter 11 Bankruptcy Relief before the United States Bankruptcy Court for the Northern District of West Virginia.

In conformance with Bankruptcy law, the Petitioner, by and through its officers and agents, appeared before the Office of the United States Trustee for the Section 341 Meeting of Creditors.

On September 4, 1997, Lloyd Fry, Respondent, filed his Motion to Dismiss the Petitioner's second bankruptcy filing, with his supporting memorandum.

In response to such Dismissal Motion, Counsel for Central West Virginia Development Corporation, filed its Plan to Pay Creditors and written Response to the Motion to Dismiss.

On September 25, 1997, the Bankruptcy Court held a hearing on the Motion to Dismiss, at which the Court orally declared that the Petitioner's second bankruptcy filing would be dismissed.

The Petitioner then filed its Post Dismissal Motions and a Motion for a Stay with the Bankruptcy Court. Such motions were denied by the Bankruptcy

Court by order entered on October 15, 1997.

The Petitioner then filed its Amended Notice of

Appeal with the District Court and the Appeal was docketed with the United States District Court for the Northern District of West Virginia, on October 21, 1997.

The Petitioner then filed its written Motion for Stay of Judgment with the District Court.

On October 23, 1997, the District Court, Robert E. Maxwell, Senior Judge, held a hearing on the Petitioner's Motion for Stay of Judgment. At the conclusion of such hearing, Judge Maxwell entered an order refusing to award the Petitioner a stay of the Bankruptcy Court's order.

The Petitioner then made application to the United States Court of Appeals for the Fourth Circuit for an emergency stay in Case Number 97-2458, but such stay was denied by the Honorable M. Blaine Michael on October 28, 1997.

Upon denial of all stays, the only asset of the Petitioner was transferred to the Respondent on the order of the Circuit Court of Harrison County, West Virginia.

With denial of its Stay Applications, the Petitioner filed its brief to the District Court on December 5, 1997. Pursuant to the parties' stipulation and the District Court's order, the Respondent filed his 7

brief on January 12, 1998.

C. Disposition by the Courts Below.

On October 2, 1997, L. Edward Friend, Judge of the United States Bankruptcy Court for the Northern District of

West Virginia dismissed the Petitioner's Chapter 11 Bankruptcy Petition under *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989).

On February 20, 1998, Robert E. Maxwell, Senior, Judge of the United States District Court for the Northern District of West Virginia, as a reviewing appellate court, issued an alternative ruling. The District Court granted the Respondent's Motion to Dismiss the appeal as moot, but the District Court went on to affirm the Bankruptcy Court's actions, upon a consideration of the appeal on the merits.

The Petitioner then filed a Petition for Rehearing on March 2, 1998. The post judgment motion was denied by the District Court, by order entered on March 12, 1998.

The Petitioner then filed its Notice of Appeal on March 23, 1998, with the United States Court of Appeals for the Fourth Circuit. On October 26, 1999 the Court of Appeals for the Fourth Circuit dismissed the Petitioner's appeal as moot.

D. Statement of Relevant Facts.

Central West Virginia Development Corporation was incorporated in 1992, with the intention of developing an unimproved fifty (50) acre tract of real estate near Interstate Seventy-Nine (79) and U. S. Route Fifty (50) in Harrison County, West Virginia. In both of its bankruptcy filings, the Corporation listed "commercial real estate development" as the nature of its business. The Corporation contacted the Respondent, Lloyd Fry, about the project and he provided

the funding for the purchase of the real estate and took two (2) notes and two (2) Deeds of Trust on the property. Such notes were due and payable on November 18, 1993, and Central West Virginia Development Corporation did not pay the notes as they fell due. Thereafter from November, 1993 to August, 1995, Central West Virginia Development Corporation and Lloyd Fry entered into a series of agreements to find a buyer for the real estate and to pay off Mr. Fry.

When no buyer was found and the notes remained unpaid, Mr. Fry, in August, 1995, filed suit in the Circuit Court of Harrison County, West Virginia, to foreclose on the real estate and collect all sums due on his notes. In addition to this State Court litigation, Mr. Fry continued to set foreclosure sales of the Corporation's real estate, which lead to the first bankruptcy filing on April 12, 1996. During the first bankruptcy filing, an agreed order was entered by the Bankruptcy Court to sell the Corporation's real estate at a public auction. Such public auction was not consummated and the United States Trustee filed to dismiss the first bankruptcy filing.

Following a hearing on April 25, 1997, the first filing was dismissed, without prejudice, by the Honorable L. Edward Friend, Judge of the Bankruptcy Court, on April 29, 1997. In such Order, Judge Friend did not set forth any facts that justified denying the Corporation future access to the Bankruptcy Court.

After the Bankruptcy Court's dismissal order of April 29, 1997, the State Court proceedings, captioned Lloyd B. Fry v. Central West Virginia Development Corporation et

al., Circuit Court of Harrison County, West Virginia, Civil Action Number 95-C-408-2, had proceeded to a final order. Such final order provided that the real estate of the Corporation, which secured a deed of trust to Lloyd B. Fry, was to be conveyed back to the secured creditor.

At all times since 1992 during the State Court proceedings and the first Bankruptcy case, the Corporation was actively engaged in the development of the real estate, pledged to Mr. Fry, and in its efforts to develop the property from 1992 to 1997, the Corporation expended Four Hundred Seventeen Thousand Nine Hundred Twenty-Two Dollars and Eighty-Eight Cents ($412,922.88).

Faced with the loss of these expenditures, Central West Virginia Development Corporation filed its second Chapter 11 proceeding on July 3, 1997, before the United States Bankruptcy Court for the Northern District of West Virginia.

Prior to the filing on July 3, 1997, Central West Virginia Development Corporation was engaged in negotiations with Kennedy Funding Group and Bollaman Development to acquire the necessary funding to develop its property and pay off Mr. Fry.

Subsequent to the second filing by Central West Virginia Development Corporation, the Petitioner obeyed the Bankruptcy Code and appeared before the representative of the United States Trustee's Office for its 341 Hearing on August 15, 1997. At such hearing, the Corporation's officer and shareholder, Errol R. Kahoun, testified concerning the

re-organizational efforts. Upon hearing the testimony presented, the U.S. Trustee observed, "if the deal goes through . . . all creditors will be made whole, so you won't have to worry about anybody taking a bath or being paid prorata or anything like that."

It is important to note that neither the Respondent, Lloyd Fry, nor his legal representatives attended this hearing. Despite their failure to attend the 341 Hearing, on September 4, 1997, Mr. Fry and his attorneys filed a Motion to Dismiss the Corporation's second filing. The Motion to Dismiss merely recited the procedural history of the State Court litigation and the first Bankruptcy filing and this procedural history stopped at July 3, 1997, the date of the second filing. The motion did not set forth any facts subsequent to the second bankruptcy filing as a basis for their Motion to Dismiss.

Upon receipt of the Motion to Dismiss, the Bankruptcy Court orally set a hearing for September 25, 1997 at Clarksburg.

At the conclusion of the Hearing on September 25, 1997, the second filing of Central West Virginia Development Corporation was dismissed by an order entered October 2, 1997.

In denying the post-dismissal motions of the Petitioner, the Bankruptcy Court issued an Order on October 15, 1997 stating that at the Hearing on September 25, 1997, the Court made specific findings from the bench under *Carolin Corporation v. Miller*, 886 F. 2d 693 (4th Cir. 1989).

A review of the transcript of the September 25, 1997 Hearing before the Bankruptcy Court shows otherwise, to-wit:

A. In arriving at its decision to dismiss the case, the Bankruptcy Court did not consider any facts concerning the bankruptcy filing on July 3, 1997. Rather, the facts dealing with a prior filing of the Corporation, Case No. 96-10576, were the exclusive basis of dismissal.

B. The Bankruptcy Court did not give the Corporation meaningful notice of the Hearing on September 25, 1997 and refused to allow the Corporation to present any evidence at the Hearing on the Motion to Dismiss. Instead the Court said, without benefit of testimony, "so in terms of a bad faith filing, my premise is I've already dismissed this case."

C. Again, without citing any facts concerning the Corporation's present bankruptcy filing, the Court says: "And you all will be allowed your objections but that's it for Central."

D. At no time at the Dismissal Hearing, did the Bankruptcy Court cite even a scintilla of evidence concerning the Petitioner's second filing. Rather, the Bankruptcy Court said, "I consider this the same case we've had before. I've been through it."

REASONS FOR GRANTING THE WRIT

There is a conflict among the Circuits of the United States, concerning the dismissal of Chapter 11 Bankruptcy

filings for bad faith.

In some Circuits of the United States, subjective bad faith alone is sufficient to warrant the dismissal of a Chapter 11 proceeding. *In Re: Phoenix Piccadilly Ltd.*, 849 F. 2d 1393 (11th Cir. 1988).

In the Fourth Circuit, however, Bankruptcy Court can dismiss a Chapter 11 proceeding, the Bankruptcy Court is required to find subjective bad faith and objective futility. In exercising their duties under this two-prong test, "bankruptcy courts should make and report findings as to both futility and bad faith." *Carolin Corporation v. Miller* 886 F. 2d 693 (4th Cir. 1989).

In the *Carolin* decision the Bankruptcy Court conducted a "searching inquiry" of the current filing of the Bankruptcy Debtor and conducted a "series of hearings" producing "voluminous evidence" in support of the Bankruptcy Court's finding of bad faith filing and objective futility. *Carolin* 886 F. 2d at 701.

It is clear that the record in this case cannot and does not support the dismissal under the *Carolin* mandates.

As stated before, the Bankruptcy Court took no evidence whatsoever on the Corporation's present financial condition. The Bankruptcy Court did not take any evidence on the proposed re-organization and could therefore, not reasonably make any finding as to whether the Petitioner could ultimately emerge from Chapter 11 ready to carry on with viable business operations. The record does not

indicate that the Court considered, or even was aware, of the Petitioner's testimony offered at the Trustee's 341 Hearing, in
which the Trustee found that the creditors could be made whole.

Rather, we are left with a record, which discloses that the only consideration of the Bankruptcy Court was the Respondent's Motion to Dismiss. As the Petitioner has stressed before, such Motion merely recites facts, occurring prior to the second filing on July 3, 1997. The Respondent's Motion to Dismiss was not verified, and was not supported by Affidavits.

Additionally, 11 U.S.C. 1112 (B), provides that a Bankruptcy Court may dismiss a Chapter 11 proceeding upon "notice and hearing." 11 U.S.C. 102 A 1 provides only that notice and hearing shall be "as is appropriate in the particular circumstances." Clearly under the mandates of the *Carolin* decision, the actions of the Bankruptcy Court were not appropriate in this case.

All of which not only falls short of meeting the two-prong test of the *Carolin* decision, but does not rise to an acceptable level of fairness or due process of law to this Bankruptcy Debtor. A further example of the Bankruptcy Court's unfairness to this Petitioner was the Court's characterization of the second Chapter 11 filing as a "serial" filing. The mere filing of a second case cannot be fairly characterized as a "series of filings."

This is especially true when the Bankruptcy Court

did not invoke its general equitable authority or its statutory authority to deny Central West Virginia Development Corporation access to the Bankruptcy Court for a maximum of one hundred and eighty (180) days under 11 U.S.C. 109, 349, in its dismissal of the first Chapter 11 filing. Accordingly, when Central West Virginia Development Corporation filed its second Chapter 11 proceeding on July 3, 1997, the only impediment to the proceeding was the two-prong test under the *Carolin* decision.

In reviewing the actions of the Bankruptcy Court, the District Court was required to properly apply the two-prong test of the *Carolin* decision. However, the

District Court, just as the Bankruptcy Court, made only a finding of bad faith from the record. The District Court's decision made no effort whatsoever to properly apply the two-prong test of objective futility and subjective bad faith. In discussing the two-prong requirement of the *Carolin* case, this Court observed: "It is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a re-organization effort so motivated might nevertheless yield a successful rehabilitation." *Carolin* 886 F. 2d at 700.

Thus, the District Court, just as the Bankruptcy Court, did not apply the proper legal standard under the *Carolin* decision, to the dismissal of the Petitioner's appeal.

Additionally, the final order of the District Court was an alternative decision. First the District Court dismissed the appeal for mootness under the Motion to Dismiss. Then the

District Court went on to decide the appeal on the merits of the case.

Such a ruling by the District Court discloses a public policy basis for requiring courts to approach bad faith bankruptcy filings with heightened scrutiny. This public policy relating to bad faith cases is an argument for allowing this Court to ignore the mootness claim in this appeal and allow this appeal to be heard on the merits of the case, as was done by the District Court.

There is authority for appellate courts to reach the merits of a claim, which is technically moot, if the issue falls within the public interest exception of the mootness doctrine. 5 Am. Jur. 2d Appellate Review §648 (1995). Under the public interest exception, if the Court insists on applying the mootness doctrine the issue at hand may never be appropriately reviewed and will frustrate the appeal process on that particular issue. 5 Am. Jur. 2d Appellate Review §648 (1995).

The Fourth Circuit recognized this exception to the mootness doctrine in *Leonard v. Hammond* 804 F. 2d 838 (4th Cir. 1986). In that case, which is not a bankruptcy case, the court recognized two (2) exceptions to the mootness doctrine including one where there are issues involved which are capable of repetition yet which evade appellate review. In that case, the court decided to hear the appeal of certain indigents, who were no longer incarcerated and where the issues before the court were technically moot, because the court felt that it was likely the indigents would be held in civil contempt again without counsel if they failed to make

child support payments.

In West Virginia Education Association v. Consolidated Public Retirement Board 194 W. Va. 501, 460 S.E. 2d 747 (1995), the West Virginia Supreme Court set forth criteria for finding that an issue deserves judicial support even though the issue is technically moot. This sort of plea for appellate review where the mootness doctrine applies in both the bankruptcy and non-bankruptcy context will only be considered where 17

the issue at hand is one of important public interest. *West Virginia Education Association v. Consolidated Public Retirement Board,* 460 S.E. 2d at 757. In *Taylor v. Gill Street Investments*, 743 P. 2d 345 (Alaska 1987), for example, the court held that whether a landlord must strictly comply with notice time provisions of the state eviction statute fell within the public interest exception to the mootness doctrine. In *Lloyd v. Board of Supervisors of Elections*, 206 Md. 36, 111 A. 2d 379 (1954), the Maryland court established certain standards for deciding when, in those rare instances, courts can ignore the mootness doctrine, including instances where the public interest will clearly be hurt if the question is not immediately decided; where the matter involved is likely to recur frequently and it recurrence will involve a relationship between the government and its citizens; or where a duty of government is at stake and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely to prevent a decision.

In this appeal the "capable of repetition, yet evading review" exception applies. Petitioner sought stays from the Bankruptcy Court, District Court and Circuit Court, all of

which were denied. If the transfer of the Petitioner's asset mooted this appeal, the Petitioner has no remedy to address the improper application of the Carolin decision by the Bankruptcy Court and District Court. All of which results in a taking of the Petitioner's property without due process of law in violation of the Fifth Amendment.

As the Petitioner asserted in its Petition for Rehearing, it is critical for bankruptcy debtors to have a meaningful appeal from Bankruptcy Court rulings. This is particularly true when the debtor believes, as in this case, that the actions of the Bankruptcy Court were arbitrary, capricious and clearly wrong.

It is clear that bad faith dismissals will continue in the Circuit Courts of the United States and if a stay is not granted, these appeals will be mooted and Bankruptcy debtors will not have an opportunity to appeal on the merits of their cases, resulting in due process violations.

The fact that the Fourth Circuit Court of Appeals requires both subjective and objective evidence of bad faith in bankruptcy matters together with the general objectives of the bankruptcy code, which are to provide debtors with a fresh start and generally review issues in a light favorable to the debtor, provided a compelling argument for an exception to the mootness doctrine.

The Fourth Circuit Court of Appeals, however, did not ever address the exceptions to the mootness doctrine set forth by the Petitioner, rendering their own Carolin decision a meaningless and unenforceable standard.

To prevent this manifest injustice, this Writ should be granted to establish a Fifth Amendment claim for Bankruptcy debtors.

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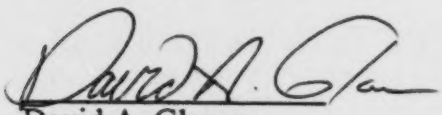
In the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), this Court recognized that federal courts can provide remedies for violations of a constitutional right. While that case dealt with Fourth Amendment rights, the necessity and appropriateness of judicial relief is no less compelling in this case then it was in Bivens.

Your Petitioner has lost its real estate holdings valued in excess of a million dollars, not because of the merits of its appeal, but due to the appellate doctrine of mootness. Your Petitioner has lost his property without an opportunity for a meaningful appeal of the actions of the Bankruptcy Court. All of which deprives the Petitioner of its property without due process of law.

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,



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Date: 1-21-00

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1443

In Re: CENTRAL WEST VIRGINIA DEVELOPMENT CORPORATION,

Petitioner,

CENTRAL WEST VIRGINIA DEVELOPMENT CORPORATION,

Plaintiff - Appellant,

Versus

LLOYD B. FRY,

And

UNITED STATES TRUSTEE; ERROL R. KOHOUN; PAMELA L. KAHOUN,

Parties in Interest.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Robert Earl Maxwell, Senior District Judge. (CA-97-181-1, BK-97-11776)

Submitted: October 21, 1999
Decided: October 26, 1999

PER CURIAM:

Central West Virginia Development Corporation (CWVDC) appeals from the district court's order dismissing as moot its appeal from the bankruptcy court's order dismissing its petition under Chapter 11 of the bankruptcy code. Because the sole asset owned by CWVDC has been transferred to Fry and CWVDC has failed to obtain a stay pending appeal, we grant Fry's motion to dismiss the appeal as moot. See 11 U.S.C § 363 (m) (1994); Willemain v. Kivitz, 764 F. 2d 1019, 1021-24 (4th Cir. 1985) (holding that sale of property to secured creditor while appeal was pending rendered appeal moot); see also In re Stadium Management Corp. 895 F. 2d 845, 847 (1st Cir. 1990) ("absent a stay, the

court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently."). We deny CWVDC's motion to strike Fry's

motion to dismiss the appeal and grant Fry's motion to dismiss the appeal and grant Fry's motion to dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:

Central West Virginia
Development Corporation,

Debtor.

CIVIL ACTION NO. 1:97CV181
BANKRUPTCY NO. 97-11776
(Maxwell)

ORDER

Upon careful consideration of the appellee's Motion to Dismiss, filed January 13, 1996 and having heard no objection thereto by appellant, it is

ORDERED that the appellee's Motion to Dismiss be, and the same is hereby **GRANTED.**

In the alternative, considering the briefs and arguments of the parties on the merits, the Court finds that the appeal is not well taken. As noted by the Court during the October 23, 1997 hearing, the Bankruptcy Court had ample evidence before it to determine that the second Chapter 11 petition was filed in bad faith, and it is apparent that the debtor attempted to use the bankruptcy court to

circumvent the final judgment of the Circuit Court of Harrison County. Accordingly, it is

ORDERED that the October 2, 1997, and October 15, 1997 orders of the Bankruptcy Court be, and the same are hereby, **AFFIRMED**, and that this appeal be **DISMISSED** and **STRICKEN** from the docket of the Court. It is further

ORDERED that, in accordance with Bankruptcy Rule 8016(b), the Clerk of the Court shall send a certified copy of this Order to all parties of record and to the Clerk of the Bankruptcy Court.

ENTER: February 20th, 1998

"s/Robert E. Maxwell"
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:

CENTRAL WEST VIRGINIA
DEVELOPMENT CORPORATION

Debtor(s).

BK NO 97-11776

ORDER DENYING MOTION TO ALTER OF AMEND JUDGMENT AND MOTION FOR STAY

The Court's factual findings and conclusions were placed on the record at the hearing held on September 25, 1997. At the time the Court made specific findings from the bench in accordance with the guidelines established by the Fourth Circuit case of Carolin Corporation v. Miller, 886 F. 2d (4th Cir. 1989).

The Court was further presented with an order of the Circuit Court of Harrison County, West Virginia, wherein the state court ordered the enforcement of a settlement agreement which would effectively remove the property from the bankruptcy estate. In the interests of comity, this Court declined to continue to exercise jurisdiction over the subject property as that would effectively overrule the state

court order which should be accomplished by appeal, not the filing a bankruptcy petition.

Inasmuch as the sale of the real estate has been mandated by the state court, this Court will not grant a stay. Accordingly, it is hereby

ORDERED that the Motion to Alter or Amend Judgment and the Motion for Stay Pending Appeal are **DENIED.**

The Clerk is directed to transmit copies of this Order to all creditors and parties in interest.

DATED: 10/15/97

"s/ L. Edward Friend II"
U. S. BANKRUPTCY
JUDGE.